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When is an anti-competitive practice truly “of serious concern”? The Google commitments decision leaves this and other questions open...Posted on [February 28, 2014](#) by [aandreangeli](#)

When the EU Commission opened its investigations on Google’s business practices on a number of market segments, related to search services and online advertising, it was clear that it was embarking in a complex and potentially long-running investigation, which could potentially turn controversial. At the time the Commission had alleged –on account of Google’s market power on the market for online search and advertising services run via search engines–that Google had infringed Article 102 TFEU in respect of four different practices: two related to the advertising space’s supply deals concluded by Google with a number of partners and alleged that the latter were limited in the freedom to select and place certain types of advertisements on their websites; the Commission also suspected Google of using similar clauses in order to force software vendors to “privilege” its own search services to those provided by rivals. The other allegations related more directly to Google’s provision of internet search services: the Commission had accused it of privileging links to “paying” services’ providers (e.g. those websites providing price comparisons) to links to websites that were not paying Google for its services, by lowering their ranking on the retrieving webpage. And finally the search engine was accused of granting preferential treatment to the results of its own vertical search services vis-a-vis rivals on the market for the provision of similar services.

As is well known, Google is the leader in the provision of internet search , with a market share of just over 71% worldwide (see: <http://www.netmarketshare.com/google-market-share>), something which in and of itself represents evidence of dominance on this market; Against this background it is not surprising that the Commission, in its March 2013 Communication following the preliminary investigation, expressed serious concerns that the undertaking may have disregarded its special responsibility by affording preferential treatment to its own as opposed to other websites’ services for “vertical search”. This position appears to be consistent with well-established precedent under Article 102 TFEU, starting from the *SeaLink/Stena Line* decision (Commission decision 94/19/EC, *Stena Sealink/Sea Containers (Hoyhead)*, [1994] OJ L15/8) and going all the way to *Telemarketing* (case 311/84, *Telemarketing v Compagnie Luxembourgeoise de Telediffusion SA and another*, [1985] ECR 3261). While it could be argued that Google is no Holyhead, its prominent market position, coupled with the network effects characterising the market and steering demand and users toward the “leading search platform” raises serious concerns that its practices may have an adverse impact on competition on these market segments, by diverting consumer choice away from rival providers on to Google’s own services for reasons that have very little to do with competition on the merits. Broadly similar remarks can also be made in respect of Google’s allegedly anti-competitive exclusivity supply deals concluded with publishers wishing to avail of the services offered by the leading search engine. It is well established that a dominant company that ties its own customers to itself in a regime of exclusivity, even if it does so at the customer’s own request, infringes Article 102 TFEU, on account of the foreclosure effect that the arrangement is likely to have on other rivals (see e.g. case 85/76, *Hoffmann LaRoche v Commission*, [1979] ECR 461, para. 89-90); on this basis, and especially taking into account the ubiquity of Google and the associated value of using its services as a means of reaching out to the public, it is not surprising that the Commission looked at these practices with considerable concern.

Fast forward almost a year–February 2014 (SPEECH/14/93): in a statement the Competition Commissioner, Joaquim Almunia, announced that the Commission had adopted a commitments decision with which it had sought to exact changes in the way in which Google had been managing both its search services, including

“vertical services”, and its supply arrangements on the market for the provision of advertising services. As a result of this decision, Google will be obliged to display links to rival websites in the same way and with the same “visual aids” as to the manner in which it displays its own; furthermore, in relation to specialised search services, Google will choose and rank paying customers on the basis of an auction processes, with the “free access” links being ranked on the basis of their “natural priority”. As to the supply of advertising services, the Commissioner announced the removal of exclusivity clauses both for publishers seeking to advertise on Google’s search pages and for the advertisers themselves, who will be able to rely on its own and on other providers’ services.

Importantly, the statement seemed to suggest that the requirement of proportionality may have played a decisive part in framing these commitments: the fact that the commitments were limited to the way in which search results are shown and do not go as far as, for instance, to prevent Google from advertising its own services; and additionally, the circumstance that access to the search engine’s space on the part of advertisers would be open to all via an auction mechanism would ensure greater equality of opportunity, thus preventing foreclosure in this neighbouring segment—both sets of commitments seem to confirm the willingness of the Commission to assuage concerns for market rivalry and openness without interfering with Google’s “search algorithm” or indeed with its own ability to compete with others ‘on the merits’.

So, can one be justified in saying that “all is (more or less) well” again on the market for the provision of internet search and online advertising services? The Commission clearly seems to think so: although he acknowledged that these behavioural commitments may require significant monitoring efforts (hence also requiring the appointment of an independent trustee for this purpose), Commissioner Almunia expressed the view that the new practices to which the Commission has now subscribed are going to provide an appropriate and effective response to the need to restore competition on a fast-moving, innovation and compatibility driven market in which the investigated company is an almost unavoidable trading partner. In his view, adopting a “proper infringement decision” would not be appropriate in view of the need of providing a speedy and “tailored response” to the concerns arising from Google’s behaviour—in fast moving markets such as these time is of essence and so is the need to make the response of the competition agencies appropriate and well-suited to addressing the concerns for maintaining rivalry. It is submitted that this approach should be welcome, since it denotes greater awareness of the sometimes peculiar dynamics of the new economy markets and consequently, a greater responsiveness to the demands of maintaining rivalry therein.

It is however the choice of relying on Article 9 in order to close this investigation that gives pause for thought. In the words of the Commissioner, concerns for users being able to “benefit from competition on the merits as soon as possible” and for ensuring an immediate response to competition concerns justified extracting commitments as a means of terminating the infringement. Nonetheless, it is undeniable that the pervasiveness of Google’s presence as supplier of internet search services and the nature and the significant impact (especially in terms of foreclosure of neighbouring markets) of the denounced practices had all the hallmarks of a serious infringement of Article 102 for which, according to the 2009 Guidance, action on the part of the Commission and potentially the imposition of fines could have been justified. The Commissioner’s statement, by contrast, appears to place the demands of “swift” action ahead of deterring similar, future infringements: this, as was stated above, is undoubtedly positive, at least in its face, since it shows greater “realism” and a commitment to assessing carefully the impact of these practices on fast-moving markets. However, it is equally clear that adopting an Article 9 decision, which contains no “official” finding of infringement and, perhaps most importantly, relies on purely behavioural obligations, comes at a considerable risk and perhaps more importantly, cost—in terms of uncertainty as to the future behaviour of the undertaking being investigated and in particular of the costs associated with monitoring the observance of these obligations. It is acknowledged that the type of response taken vis-a-vis Google will be met with relief among the IT business community—no lengthy and invasive investigations, no infringement decision, no potentially sizeable fine. However, shortly after the Commissioner’s Speech news outlet reported “unease” both within the Commission and among Google’s rivals at the perspective of the leading search

engine to be able to “get away” without having to admit liability for the infringement (see for instance reports in The Register, 14 February 2014, http://www.theregister.co.uk/2014/02/14/ec_officials_voice_doubts_about_almunia_planned_settlement_deal_with_google_on_search_biz); more generally, it may be wondered why, in the face of potentially serious competition breaches, Google could be regarded as being treated “more benevolently” than other IT undertakings, such as Microsoft (see e.g. the report in Bloomberg, 12 February 2014: <http://www.bloomberg.com/news/2014-02-12/google-deal-with-almunia-said-to-be-criticized-by-eu-officials.html>).

Against this background, can the commitments decision addressed to Google be regarded as a suitable and effective response to the nature of the practices and to the demands of addressing their anti-competitive effects on the market? It is suggested that due to the length of the investigation, the decision can hardly be regarded as a knee jerk reaction to the traditional plea that ‘something must be done’ to prevent Google from interfering with any remaining competition on the markets affected by its position of market power. Yet, one cannot help but doubting whether the costs associated with monitoring its compliance with the decision and, perhaps more significantly, the message that an article 9 decision in this area sends to other players in this and other markets that are compatibility- and network effect-driven are likely to outweigh any of the allegedly positive implications of not resorting to a fully fledged investigation and, potentially, to adopting an infringement decision. For many years, the EU Commission has sometimes been criticised for relying perhaps too often and in too heavy-handed a manner on financial penalties without perhaps pausing to consider whether “less intrusive” sanctioning responses could have been more appropriate. However, in the face of the Google case it may legitimately be queried whether the Commission may have chosen to adopt an approach to these issues that is more “responsive” to the nature of the market and to the demands of consumer welfare in a case which could have warranted a less “expensive” (especially in monitoring terms) and perhaps more forceful solution, if only to stigmatise the seriousness and the wide anti-competitive impact of the practices for which Google had been investigated.

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